IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO.93 OF 2004

IN

NOTICE NO.N/44 OF 2004

Re: M/s.Kishan Silk Mills & Ors.

..Judgment Debtors.

Ex-parte:

The Bharat Co-operative Bank

(Mumbai) Ltd. ..Judgment Creditor.

....

Mr.Kishore Jain with Mr.G.R.Mehta for Judgment Creditor.

Mr.Snehal Shah i/b M/s.Vimadalal & Co.

for Judgment Debtor Nos.4 and 5.

....

CORAM : DR.D.Y.CHANDRACHUD, J.

15th February, 2005.

P.C. :

1. The Notice of Motion is for setting aside the insolvency notice. A recovery certificate was issued on 27th August, 2002 by the Assistant Registrar of Co-operative Societies under which an

amount of Rs.1.40 Crores approximately is due and payable to the bank. A copy of the order of the Assistant Registrar has been placed before the Court and in paragraph 4 the following statement appears which would show that though time was taken before that authority to settle the dispute and the debtors accepted the claim of the bank, no concrete proposal for the payment of the outstanding dues was forthcoming. Paragraph 4 of the order of the Assistant Registrar reads as thus:

> "4) Whereas the Respondent Nos.2 to 5 are the partners of Respondent No.1 partnership firm and the other Respondents are Guarantors. At the time of hearing on the date 27/2/02 it was informed on behalf of the Respondent Nos.2, 3 and 4 that the said partnership firm was closed on account of dispute among its partners and further it was requested to grant time to settle the said dispute. Further, it was stated that arrears in the recovery application were agreeable and request was made to grant time to submit proposal for payment of arrears. Accordingly, they were given sufficient opportunity. However, none

> of the Respondents submitted proposal regarding payment of arrears mentioned in the application. There is no dispute of any kind as regards the arrears of the Respondents and at the time of final hearing, the partners were instructed to contact the bank for settling the disputes among them."

2. The insolvency notice was taken out on 2nd April, 2004 after the recovery certificate came to be issued under Section 101 of the Maharashtra Co-operative Societies Act, 1960. The recovery certificate has attained finality and a statement has been made before the Court that no revision under Section 154 of the Act is filed in order to challenge the recovery certificate.

3. Before this Court, it has been urged that (i) An order passed by the Assistant Registrar under Section 101 is not a decree; and (ii) A Full Bench of this Court has held that after coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 an application for recovery would not lie under Section 101 of the Maharashtra Co-operative Societies Act, 1960. It is common

ground between the counsel that the judgment of the Full Bench has been stayed by the Supreme Court during the pendency of the appeal before the Supreme Court. Besides, I am of the view that it would neither be appropriate nor proper to entertain the Motion at this stage for more than one reason. On 6th January, 2003 a letter was addressed by the debtors to the Special Recovery Officer (Exh.4 to the affidavit in support) recording that the debtors have no assets or properties which can be attached and sold in execution of a decree of the Court. This position was stated as far back as in January 2003. The act of insolvency would stand complete only upon the rejection of the Motion for setting aside the insolvency notice. Even at this stage, I had called upon counsel appearing on behalf of the Applicants to seek instructions on whether the Applicants are in a position to deposit atleast the principal amount of the dues which is in excess of Rs.82 lacs. Counsel states on instructions that the Applicants are not in a position to deposit or secure any part of the dues. The disposal of the Motion at the present stage would still leave it open to the Applicants to pursue such remedies that

they have including the remedy by way of annulment. The Applicants will be at liberty to urge all appropriate defences when a petition for adjudication is filed including those urged here. Having regard to the financial position of the Applicants which is evident from the circumstances which has been narrated in the earlier part of this order, I do not find any reason to grant the relief which has been prayed for in the Motion, particularly in the light of the fact that the recovery certificate has been allowed to attain finality after the Applicants participated in the proceedings before the Assistant Registrar. The Motion is accordingly rejected.